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New Developments in the NLRB Deference to Arbitration

NEW DEVELOPMENTS IN THE NLRB DEFERENCE TO ARBITRATION

The National Labor Relations Act, as enacted in 1935 and as amended in 1947 and 1959,[1] had the dual purpose of providing orderly and peaceful procedures for the resolution of industrial disputes and protecting the rights of workers and employers.[2] In pursuit of these purposes, the National Labor Relations Board was empowered with exclusive, though discretionary, jurisdiction over national labor affairs.[3] The Board has generally chosen to exercise its jurisdiction over labor disputes, particularly those involving unfair practices under the NLRA, and has deferred to private arbitration only in a limited number of circumstances. A recent decision, *Collyer Insulated Wire*,[4] demonstrates a shift in the Board's attitude from protecting the worker by vigorous

1. National Labor Relations Act [hereinafter referred to as NRLA] codified in various sections of 29 U.S.C. (1970). The policy of the Act is stated in 29 U.S.C. § 151:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of the terms and conditions of their employment or other mutual aid or protection.

2. *See* Ordman, *The NLRA in 1969*, N.Y.U. 22D ANNUAL CONFERENCE ON LABOR 11 (1970). *See also* the statement of purpose in the Norris-LaGuardia Act, 29 U.S.C. § 102 (1970) which provides:

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

But see Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 251 (1970), where the Court said that unions have come of age and hence the national labor policy should no longer emphasize the protection of the nascent labor movement, but rather the encouragement of collective bargaining and administrative techniques for the peaceful resolution of industrial disputes.

3. 29 U.S.C. § 160(a) (1970).

4. 192 N.L.R.B. No. 150 (1971).

federal action to promoting industrial peace by encouraging private settlements[5] and poses the possibility of more frequent Board deference to private arbitration.

I. NATIONAL LABOR POLICIES TOWARD ARBITRATION

Congress gave special recognition to the collective bargaining process in the 1947 Labor-Management Relations Act.[6] Section 201(a) provides: "that it is the policy of the United States that sound and stable industrial peace . . . can most satisfactorily be secured by the settlement of issues between employers and employees through the process of conference and collective bargaining . . . ."[7] Section 203(d) states, "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."[8]

Arbitration is a part of the collective bargaining process. The negotiating parties recognize when they make their collective bargaining agreement that they may not have anticipated all contingencies and that there may be many differences of opinion as to the proper application of the contract's standards. Accordingly, agreements establish grievance procedures, including arbitration, for the adjustment of complaints and disputes arising during the term of the agreement. The autonomous rule of law thus established contemplates that the dispute will be adjusted by the application of reasonable interpretation of the contract.[9]

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5. For a discussion of the advantage of private settlements, see Shulman, *Reason Contract and Law in Labor Relations,* 68 HARV. L. REV. 999, 1024 (1955):

> The arbitration is an integral part of the system of self-government. And the system is designed to aid management in its quest for efficiency, to assist union leadership in its participation in the enterprise, and to secure justice for the employees. It is a means of making collective bargaining work and thus preserving private enterprise in a free government. When it works fairly well, it does not need the sanction of the law of contracts or the law or arbitration. It is only when the system breaks down completely that the courts' aid in these respects is invoked. But the courts cannot, by occasional sporadic decision, restore the parties' continuing relationship; and their intervention in such cases may seriously affect the going systems of self-government.

6. Act of June 23, 1947, Pub. Law 101, 80th Cong., 1st Sess., 61 Stat. 136 (codified in scattered sections of 18, 29 U.S.C.).

7. 29 U.S.C. § 171(a) (1971).

8. 29 U.S.C. § 173(d) (1971).

9. *See* Schulman, *Reason, Contract and Law in Labor Relations,* 68 HARV. L. REV. 999, 1007 (1955).

The legislative history of the Act indicated a strong Congressional intent to encourage arbitration, but not compulsory arbitration:

> Compulsory arbitration is the antithesis of free collective-bargaining . . . the existence of compulsory arbitration laws not only eliminates free collective-bargaining in situations where the parties are genuinely at odds, but will frequently encourage one or both of the disputants to make only a pretense of bargaining in anticipation of a more favorable award from an arbitrator than would be realizable through their own efforts . . . . Conciliation and mediation are instruments of free collective-bargaining, aids to the parties in arriving at voluntary and mutually acceptable settlements. Compulsory arbitration would discourage their use in the same degree that it would lessen the inclination to bargain freely in arriving at settlements in labor disputes.[10]

Congress was concerned that the parties to a collective bargaining agreement should be bound by the terms of the contract. The Senate Report stated, "Statutory recognition of the collective agreement as a valid, binding and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace."[11] Yet, Congress rejected an attempt to compel parties to arbitrate, even where arbitration was within the terms of the contract, by eliminating a provision in the Taft-Hartley bill which would have made failure to honor an agreement to arbitrate an unfair labor practice.[12]

The Supreme Court has also indicated its concern with protecting the vitality of the arbitral process. In the *Steelworkers Trilogy*,[13] the Court emphasized that, as a matter of national labor policy, arbitration was to be preferred to judicial action for resolving disputes alleging contractual violations. Relying on section 203(d) of the Act, Justice Douglas stated, "That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play."[14] Later in the opinion, Justice Douglas observed, "The agreement is to submit all grievances to

10. H.R. REP. No. 245, 80th Cong., 1st Sess. 101 (1947).

11. S. REP. No. 105, 80th Cong., 1st Sess. 17 (1947).

12. H.R. REP. No. 510, 80th Cong., 1st Sess. 42 (1947).

13. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warriors Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960).

14. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

arbitration, not merely those which the court will deem meritorious."[15] More recently, in *Boys Market, Inc. v. Retail Clerks Union, Local 770*,[16] Justice Brennan, speaking for the Court, noted the importance that Congress has attached to the voluntary settlement of labor disputes and particularly to arbitration. Justice Brennan went on to say that *Textile Workers Union v. Lincoln Mills of Alabama*,[17] in its exposition of section 301(a), "went a long way towards making arbitration the central institution in the administration of collective-bargaining contracts."[18]

II. NLRB Exclusivity In Cases Involving Arbitration

Jurisdiction Granted the Board Under NLRA

Although providing that private settlements were the desirable means of promoting industrial peace, the NLRA also granted the National Labor Relations Board jurisdiction over unfair labor practice disputes. Under section 10(a) of the NLRA of 1935:

> The Board is empowered . . . to prevent any person from engaging in any unfair labor practice. . . . This power shall be exclusive, and shall not be effected by any other means of adjustment or prevention that has been or may be established by agreement, code, law or otherwise . . . .[19]

Section 10(a) was intended to make clear that, although other agencies may be established by code, agreement or law to handle labor disputes, such other agencies could not divest the NLRB of jurisdiction.[20]

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15. *Id.* at 568.
16. 398 U.S. 235 (1970).
17. 353 U.S. 448 (1957).
18. 398 U.S. 235, 252 (1970).
19. 29 U.S.C. § 160(a) (1970).
20. *See,* LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1301 [hereinafter cited as LEGISLATIVE HISTORY].

The original Senate printing of LEGISLATIVE HISTORY contained a different section 10(b) which was never enacted. This section evinces the Senate's intention to test inclusive discretionary jurisdiction in the Board.

> The Board may, in its discretion, defer its exercise of jurisdiction over any such unfair labor practice in any case where there is another means of prevention provided for by the agreement, code, law or otherwise, which has not been utilized. But in any case where the Board has so deferred, the Board may at any time thereafter institute proceedings under this Act in order to assure the effectuation of the policy of this Act and the development of a uniform body of administrative interpretation and practice with respect to unfair labor practices as defined herein.

In the amendments contained in the Taft-Hartley Act of 1947,[21] Congress modified the exclusive nature of the Board's power to remedy unfair labor practices by eliminating the words "shall be exclusive" and by adding a proviso empowering the Board to cede jurisdiction to a state or territorial agency under certain conditions:

> By retaining the language which provides that the Board's powers under Section 10 shall not be affected by other means of adjustment, the conference agreement makes clear that, when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of, other remedies.[22]

Professor Morris maintains[23] that the NLRB has exclusive and primary jurisdiction over the adjudication of unfair labor practices, except where it cedes jurisdiction as provided in section 10(a) or declines jurisdiction as provided in section 14(c).[24] The Board may give effect to private agreements to settle disputes by allowing the parties a full opportunity to reach a voluntary accommodation without governmental intervention.[25]

Exclusivity Doctrine of the Board

Because the *Steelworkers Trilogy*[26] dealt with the relationship of arbitration to the courts rather than to the Board, the Board has not felt bound to follow those decisions. Instead, the Board has concluded

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21. *See* note 5 *supra.*

22. H.R. REP. No. 510, 80th Cong., 1st Sess. 52 (1947).

23. C. MORRIS, THE DEVELOPING LABOR LAW 441 (1970) [hereinafter cited as MORRIS].

24. NLRA § 14(c)(1), 29 U.S.C. 164(c)(1) (1970), provides:

> The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employees, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided,* That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

25. However, the right to resort to the Board for relief against unfair labor practices cannot be foreclosed by private contract. *See* Machinists Local 743 v. United Aircraft Corp., 337 F.2d 5 (2d Cir. 1964):

> The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices. . . . This public interest in preventing unfair labor practices cannot be entirely foreclosed by a purely private arrangement, no matter how attractive the arrangement may appear to be to the individual participants.

26. *See* note 13 *supra.*

that recognition of arbitration agreements is a matter within its complete discretion. Emphasizing section 10(a) of the Act, the Board has held that jurisdiction, once established in all other respects, is not to be affected by an agreement entered into by private parties.[27]

In representation disputes, Congress has directed the Board to define the bargaining unit in such a way as to "assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter."[28] Since the proper representation is essential to the collective bargaining process, the Board has rarely deferred to an arbitrator.[29] The tenacity of the Board is illustrated by the final disposition of *Carey v. Westinghouse Electric Corp.*[30] The Supreme Court held that the NLRB should defer to arbitration proceedings in a jurisdictional dispute until an award had been made. The Court determined that grievance procedures furthered the policies of the NLRA, and that the Board should actively encourage voluntary settlements of work assignments.[31] After the arbitrator's award was rendered, the Board asserted its jurisdiction:

> [T]he ultimate issue of representation could not be decided by the arbitrator on the basis of his interpreting the contract under which he was authorized to act, but could only be resolved by utilization of Board criteria for making unit determinations.[32]

Because of the important public interest considerations in determining the bargaining unit, the Board continues to adhere to its exclusive jurisdiction doctrine by refusing to defer to arbitration in representation disputes.[33] In *Woodlawn Farm Dairy Co.*,[34] a union was charged with discriminating against members of a sister local who were transferred

27. NLRB v. Wagner Iron Works, 220 F.2d 126 (7th Cir. 1955), *cert. denied*, 350 U.S. 981 (1956); NLRB v. Walt Disney Prods., 146 F.2d 44 (9th Cir. 1944), *cert. denied*, 324 U.S. 877 (1945).

28. 29 U.S.C. § 159(b) (1970).

29. *See* Pullman Indus., Inc., 159 N.L.R.B. 580 (1966); Hotel Employers Assoc., 159 N.L.R.B. 143 (1966); Goodyear Tire & Rubber Co., 147 N.L.R.B. 1233 (1964); Insulation & Specialties, Inc., 144 N.L.R.B. 1540 (1963). *But see* Raley's Supermarkets, Inc., 143 N.L.R.B. 256 (1963), where the Board did defer to the arbitrator.

30. 375 U.S. 261 (1964).

31. *Id.* at 266.

32. 162 N.L.R.B. 768, 771 (1967).

33. *E.g.*, Sheet Metal Workers Local 162, 151 N.L.R.B. 195 (1965); Carpenters Dist. Council, 150 N.L.R.B. 991 (1965); Plumbers & Pipefitters Local 7, 150 N.L.R.B. 461 (1964); News Syndicate, 141 N.L.R.B. 578 (1963).

34. 162 N.L.R.B. 48 (1966). *See* Carpenters Local 189, 162 N.L.R.B. 950 (1967).

into the first union's jurisdiction. The Board reiterated its position that there was no policy reason to defer. Grievance arbitration procedures in the contract between the employer and the first union failed to protect the interests of the transferred members of the sister local. More recently, *in Dayton Typographic Service, Inc.*,[35] the Board would not defer to arbitration where the employer denied the right of a union representative to attend a quality control meeting. At issue was the extent to which union representation also applied to day-to-day dealings with the employees.

The Board has not deferred to arbitration in disputes involving discriminatory practices brought under sections 8(a)(3),[36] 8(a)(4)[37] or 8(b)(2)[38] of the Act,[39] and the courts have approved this policy. The Fifth Circuit held in *Teamsters Local 5 v. NLRB*[40] that the NLRB has jurisdiction of unfair labor practice proceedings against a union

35. 176 N.L.R.B. No. 48 (1969).

36. NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970), provides in part:

(a) It shall be an unfair labor practice for an employer—

. . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

37. NLRA § 8(a)(4), 29 U.S.C. § 158(a)(4) (1970), provides in part:

(a) It shall be an unfair labor practice for an employer—

. . .

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

38. NLRA § 8(b)(2), 29 U.S.C. § 158(b)(2) (1970), provides in part:

(b) It shall be an unfair labor practice for a labor organization or its agents—

. . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . . .

39. A. Finkl & Sons Co., 180 N.L.R.B. 826 (1970); Eastern Ill. Gas & Securities Co., 175 N.L.R.B. 639 (1969); McLean Trucking Co., 175 N.L.R.B. 440 (1969); Producers Grain Corp., 169 N.L.R.B. 466 (1968); Star Expansion Indus. Corp., 164 N.L.R.B. 563 (1967); Flasco Mfg. Co., 162 N.L.R.B. 611 (1967); Hodcarriers Local 300, 159 N.L.R.B. 1128 (1966); Woodlawn Farm Dairy Co., 162 N.L.R.B. 48 (1966); Auburn Rubber Co., 156 N.L.R.B. 301 (1965); Hoisting Eng'rs Local 701, 152 N.L.R.B. 49 (1965); Aerodex Inc., 149 N.L.R.B. 192 (1964); Electric Motors & Specialties Inc., 149 N.L.R.B. 131 (1964); National Screen Prods. Co., 147 N.L.R.B. 746 (1964); Thor Power Tool Co., 148 N.L.R.B. 1379 (1964); Lummus Co., 142 N.L.R.B. 517 (1963).

However, in Schott's Bakery, Inc., 164 N.L.R.B. 332 (1967) and Howard Elec. Co., 166 N.L.R.B. 338 (1967), the Board deferred to an arbitration award which dealt with the alleged unlawful discharges consistently within the policies of the Act.

40. 389 F.2d 757 (5th Cir. 1968).

which violated the rights of its members under the Labor Management Relations Act (LMRA). Again, in *Steves Sash & Door, Inc.*,[41] the same circuit held that the Board properly declined to defer to arbitration in a case involving the discharge of an employee for union activity.

The Board has been fairly consistent in exercising jurisdiction over cases involving refusal to bargain collectively under either section 8(a)(5)[42] or section 8(b)(3)[43]. These cases generally have arisen in one of two situations: where one party has refused to provide necessary information thereby preventing effective bargaining; or where the employer has taken some form of unilateral action without consultation with the union.

In *NLRB v. Acme Industrial Co.*,[44] the Supreme Court held that the Board has jurisdiction before arbitration to order an employer to furnish the union with information needed for determining if the collective bargaining agreement has been violated. The Court stated, "the assertion of jurisdiction by the Board in this case in no way threatens the power which the parties have given the arbitrator to make binding interpretations of the labor agreement."[45] The Board has taken a position consonant with *Acme*, refusing to defer to cases involving the right to relevant information, and has been affirmed by the Seventh Circuit.[46]

The Board tends to retain exclusive jurisdiction in cases involving unilateral actions, though no definitive rationale for its position has been developed. Between 1960 and 1967, the Board decided sixteen out of twenty unilateral action disputes involving the duty to bargain.[47]

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41. 430 F.2d 1364 (5th Cir. 1970). In accord with Illinois Ruan Transport Corp. v. NLRB, 404 F.2d 274 (8th Cir. 1968); NLRB v. Wagner Iron Works, 220 F.2d 126 (7th Cir.), *cert. denied*, 350 U.S. 981 (1955); NLRB v. Bell Aircraft Corp., 206 F.2d 235 (2d Cir. 1953); NLRB v. Walt Disney Prods., 146 F.2d 44 (9th Cir. 1944), *cert. denied*, 324 U.S. 877 (1945).

42. NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970).

43. NLRA § 8(b)(3), 29 U.S.C. § 158(b)(3) (1970).

44. 385 U.S. 432 (1967).

45. *Id.* at 438.

46. P.R. Mallory & Co. v. NLRB, 422 F.2d 757 (7th Cir. 1970). *See* Scandia Restaurants, Inc., 171 N.L.R.B. 326 (1968) for the Board not deferring to arbitration, but rather requiring relevant information furnished.

47. For a discussion of these cases, see Note, *The NLRB and Deference to Arbitration*, 77 YALE L.J. 1191, 1213 (1968).

The 16 cases decided on the merits are: Adelson, Inc., 163 N.L.R.B. 365 (1967); Gravenslund Operating Co., 168 N.L.R.B. 513 (1967); W.P. Ihrie & Sons, 165 N.L.R.B. 167 (1967); Scam Instrument Corp., 163 N.L.R.B. 284 (1967); American Fire Apparatus Co., 160 N.L.R.B. 1318 (1966); Central Rufina, 161 N.L.R.B. 696

They refused to defer despite the existence in each case of an arbitration clause covering contract interpretations. In asserting jurisdiction, the Board usually advanced any one of a number of reasons: neither party to the contract had invoked the arbitration process; the respondent had frustrated the arbitration process by refusing to process the grievance; the contract was clear and unambiguous; the charging party had not waived its right to bargain about the change in working conditions; and the arbitrator could not resolve the dispute.[48]

Exceptions to the Exclusivity Doctrine of the Board

It is now well settled that where an arbitration award has already been rendered, the Board will honor the award if it meets certain standards.[49] In the landmark case, *Spielberg Manufacturing Co.*,[50] an unfair labor practice charge was filed following an arbitration award rendered as part of a strike settlement. The NLRB refused to review the case, stating:

> The proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act. In these circumstances, we believe that the desirable objective of encouraging the

(1966); Crescent Bed Co., 157 N.L.R.B. 296 (1966); C & S Industries, Inc., 158 N.L.R.B. 454 (1966); American Sign Co., 153 N.L.R.B. 537 (1965); Century Papers, Inc., 155 N.L.R.B. 358 (1965); Huttig Sash & Door Co., 154 N.L.R.B. 1567 (1965); Cloverleaf Div. of Adams Dairy Co., 147 N.L.R.B. 1410 (1964); Leroy Mach. Co., 147 N.L.R.B. 1431 (1964); Puerto Rico Tel. Co., 149 N.L.R.B. 950 (1964); Smith Cabinet Mfg. Co., 147 N.L.R.B. 1506 (1964); Square D Co., 142 N.L.R.B. 332 (1963).

The 4 cases in which the Board deferred are: Vickers, Inc., 153 N.L.R.B. 561 (1965); Flintkote Co., 149 N.L.R.B. 1561 (1964); Bemis Bros. Bag Co., 143 N.L.R.B. 1311 (1963); Montgomery Ward & Co., 137 N.L.R.B. 418 (1962).

48. *See* Consolidated Freightways Corp., 181 N.L.R.B. 856 (1970) (jurisdiction asserted despite grievance arbitration procedure; it appearing that no grievance had been filed with regard to these issues); Iron Workers Local 229, 183 N.L.R.B. No. 35 (1970) (failure to exhause grievance-arbitration procedures is neither bar to unfair labor practices proceeding nor defense to unfair labor practice); Cello-Foil Prods., Inc., 178 N.L.R.B. 679 (1969) (Board will not defer since mere existence of grievance-arbitration procedure is insufficient to warrant deferral, particularly where arbitration has not been invoked and time to do so has long passed); United Aircraft Corp., 180 N.L.R.B. 278 (1969) (presence of arbitration agreement does not oust NLRB from its power to act especially where parties themselves have chosen not to resort to arbitration).

49. MORRIS, *supra* note 23, at 489.

50. 112 N.L.R.B. 1080 (1955).

> voluntary settlement of labor disputes will best be served by our recognition of the arbitrator's award.[51]

Thus, the Board has established at least one exception to the exclusive jurisdiction doctrine. When an arbitration award has already been fairly rendered,[52] the Board's jurisdiction to settle unfair labor disputes need not be exercised. The Seventh Circuit Court of Appeals confirmed the discretion vested in the NLRB to accept or reject an arbitrator's award: "[T]he Board has the discretion to defer to the decision of an arbitrator. [The court's] function in reviewing such cases is to determine whether the Board abused its discretion in so deferring."[53]

While the Board as a general rule will exercise exclusive jurisdiction over unfair labor practice cases involving unilateral action,[54] the Board has deferred under certain circumstances. Board deference is supported on the theory that arbitration is the remedy for which the parties have bargained; the Board's refusal to take action on the complaint encourages the parties to exhaust their private remedies and adhere to the terms of their contracts. This process is in conformity with the policies set out in the Labor-Management Relations Act.[55] Still, the Board has the statutory power to prevent persons from engaging in any

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51. *Id.* at 1082. In deferring to arbitration awards the NLRB went even further in International Harvester Co., 138 N.L.R.B. 923, 927 (1962), when the Board stated

> If complete effectuation of the Federal policy is to be achieved . . . the Board . . . should give hospitable acceptance to the arbitral process as "part and parcel of the collective bargaining process itself," and voluntarily withhold its undoubted authority to adjudicate alleged unfair labor practice changes involving the same subject matter, unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act.

52. For cases in which the Board refused to defer to an arbitration award rendered, see Steves Sash & Door, Inc., 178 N.L.R.B. 154 (1969); DC International, Inc., 162 N.L.R.B. 1383 (1967); Hotel Employers Ass'n, 159 N.L.R.B. 143 (1966); Pullman Indus., Inc., 159 N.L.R.B. 580 (1966); Virginia-Carolina Freight Lines, Inc., 155 N.L.R.B. 447 (1965); Auburn Rubber Co., 156 N.L.R.B. 301 (1965); Youngstown Cartage Co., 146 N.L.R.B. 305 (1964); Roadway Express, Inc., 145 N.L.R.B. 513 (1963); Precision Fittings, Inc., 141 N.L.R.B. 1034 (1963); Gateway Transport Co., 137 N.L.R.B. 1763 (1962); Monsanto Chem. Co., 130 N.L.R.B. 1087 (1961); Ford Motor Co., 131 N.L.R.B. 1462 (1961); Hershey Chocolate Co., 129 N.L.R.B. 1052 (1960); Honolulu Star-Bulletin Ltd., 123 N.L.R.B. 395 (1959).

53. Ramsey v. N.L.R.B., 327 F.2d 784, 787-88 (7th Cir. 1964).

54. *See* notes 45 and 46 *supra* and accompanying text.

55. 29 U.S.C. § 171(a) (1970).

unfair labor practice,[56] and deferring to arbitration may arguably compel the parties to arbitrate.[57]

The first case concerning unilateral action in which the Board declined to assert jurisdiction was *Consolidated Aircraft Co.*,[58] which involved a company order establishing working hours without consultation with the union. When considering the union's charges, the Board stated:

> We are of the opinion, however, that it will not effectuate the statutory policy of "encouraging the practice and procedure of collective bargaining" for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act. On the contrary, we believe that parties to collective contracts would thereby be encouraged to abandon their efforts to dispose of disputes under the contracts through collective bargaining or through the settlement procedures mutually agreed upon by them, and to remit the interpretation and administration of their contracts to the Board.[59]

The Board spelled out the basis for deference to arbitration in *Joseph Schlitz Brewing Co.*[60] The issue was whether the employer, implementing a change in relief periods during the term of the contract, failed to comply with section 8(d)[61] requirements and thereby violated section 8(a)(5)[62] and 8(a)(1)[63] of the Act. The Board found that there had been a long established and successful bargaining relationship and no other alleged unlawful conduct by the parties. There was

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56. 29 U.S.C. § 160(a) (1970).
57. *See* note 9 *supra* and accompanying text.
58. 47 N.L.R.B. 694 (1943).
59. *Id.* at 706.
60. 175 N.L.R.B. 141 (1969).
61. NLRA § 8(d), 29 U.S.C. § 158(d) (1970) provides in part:
> . . . to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment . . . .

62. NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970) provides in part:
> (a) It shall be an unfair labor practice for an employer . . .
> (5) to refuse to bargain collectively with the representatives of employees . . . .

63. NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (1970) provides in part:
> (a) It shall be an unfair labor practice for an employer—
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 . . . .

no anti-union motivation in the actions of the employer, and the dispute arose out of good faith assertions of contractual rights.[64] The Board held that the employer had acted reasonably throughout the process of altering its operations and stated:

> Thus, we believe that where, as here, the contract clearly provides for grievance and arbitration machinery, where the unilateral action taken is not designed to undermine the Union and is not patently erroneous but rather is based on a substantial claim of contractual privilege, and it appears that the arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act, then the Board should defer to the arbitration clause conceived by the parties. This particular case is indeed an appropriate one for just such deferral.[65]

If the action is not designed to undermine the union, is not *patently* erroneous, but is *substantially* privileged under the contract, and is discussed with the union, the Board, utilizing the *Schlitz* doctrine, will in its discretion defer to the arbitration clause in the contract.

III. Further Developments In Deferring To Arbitration Procedures: Collyer Insulated Wire

The dispute in *Collyer Insulated Wire*[66] involved purported violations of section 8(a)(5)[67] and 8(a)(1)[68] of the NLRA arising from unilateral changes in certain wages and working conditions. The employer responded with the contention that the changes were sanctioned under the contract, and, in the alternative that any of its actions in excess of contractual authorization should have been remedied by the grievance and arbitration procedures provided in the contract. The Board dismissed the complaint on the grounds that the dispute was essentially over the terms and meaning of the collective bargaining agreement and that the parties should be required to settle the dispute pursuant to the provisions of the contract. The Board, however, did retain jurisdiction for the purpose of entertaining an appropriate and timely motion for further consideration if, (a) the grievance was not resolved with reasonable promptness or submitted to arbitration, or (b)

64. Joseph Schlitz Brewing Co., 175 N.L.R.B. 141 (1969).
65. *Id.* at 142.
66. 192 N.L.R.B. No. 150 (1971).
67. *See* note 60 *supra.*
68. *See* note 61 *supra.*

the arbitration procedures were unfair or irregular, or reached a result repugnant to the Act.[69]

Of particular importance to the Board was the fact "that the circumstances of [*Collyer*], no less than those in *Schlitz* weigh[ed] heavily in favor of deferral."[70] The parties had a long and mutually beneficial history of collective bargaining, and the operative contract provided a means for resolving the dispute. Furthermore, the Board found deference to arbitration with retained jurisdiction compatible with the *Spielberg* doctrine, encouraging the parties to achieve a final settlement. In this light, the Board viewed its decision, not as enforcing compulsory arbitration, but as requiring the parties to honor their contractual obligations.

Member Brown, in his concurring opinion, would go even further. He stated, "[t]he deferral policy should be applied to disputes covered by the collective-bargaining agreement and subject to arbitration whether the disputes involve alleged violations of Section 8(a)(5), (3), or (1) or whether brought by the employer, the union, or an employee."[71] In his view, it makes no difference whether there has been an arbitration award or not. If the dispute encompasses matters which are covered under the collective bargaining agreement and does not involve the acquisition of new rights, Member Brown would defer to the arbitration process provided in the contract.

Member Fanning, in his dissent, felt the employer's actions were proper subjects for collective bargaining and that by these changes, the company violated sections 8(a)(5) and 8(a)(1) of the Act. The Act gives the Board clear authority to rule upon unfair labor practices despite the availability to the parties of private arbitration.[72] However, the majority's insistence that the parties' statutory rights cannot be adjudicated in this case, except through the authority of an arbitrator, verges on the practice of compulsory arbitration, which is clearly contrary to the Congressional intent.[73]

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69. Collyer Insulated Wire, 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931, 1932 (1971).

70. *Id.* at 1936.

71. *Id.* at 1939.

72. *Id.* at 1941.

73. *Id. See* Address by NLRB Member John H. Fanning, *The Impact of Collyer on Arbitration*, Eighth Annual Labor-Management Conference on Collective Bargaining and Labor Law, Feb. 5, 1972, in 79 LAB. REL. REP. 163 (1972).

Member Jenkins, dissenting, regarded the majority holding as a complete reversal of Board precedent and urged return to the doctrine of exclusive board jurisdiction. Relying on *Amalgamated Association of Street Electric Railway Employees v. Lockridge*,[74] in which the Supreme Court held the Taft-Hartley Act preempted a state court's jurisdiction over a discriminatory practice action, he stated:

> If the Supreme Court is unwilling to give to state courts jurisdiction to decide suits which "arguably" involve an unfair labor practice under the Act and at the same time involve a contract interpretation issue, this Board can hardly relinquish its paramount jurisdiction to a private tribunal or to an arbitrator whose decision by definition has no precedential value, whose determination may not decide or touch upon the statutory violation, and whose award may not remedy present statutory violations and cannot control future conduct, however unlawful the present conduct may have been. . . . *Lockridge* is conclusive authority that the Board lacks the power to take even the first step toward relinquishing or undermining its jurisdiction.[75]

IV. Future Projections Of The Collyer Doctrine

In the NLRB General Counsel's words, "the key to an understanding of the *Collyer* case lies in the 'circumstances' of that and the *Schlitz* case."[76] The applicability of the *Collyer* policy of deferral to arbitration can be ascertained only by an examination of the various circumstances on which the Board relied in choosing to defer.

First, the Board relied on the long and productive relationship between the union and employer in which they mutually and voluntarily resolved the conflicts inherent in collective bargaining.[77] Because the Board has discretionary power in deferring or refusing to defer to arbitration, rather than making a substantive unfair labor practice finding, the Board may consider past settlements of unfair labor practice charges, strikes and lockouts, and arbitration experience of the parties.[78] The length of time that the parties must enjoy amiable rela-

74. 403 U.S. 274 (1971).

75. Collyer Insulated Wire, 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931, 1945 (1971).

76. Address by NLRB General Counsel Peter G. Nash, *First Questions From Collyer*, FMCS-AAA Regional Conference on Labor Arbitration, Oct. 15, 1971, in 78 Lab. Rel. Rep. 159, 160 (1971) [hereinafter cited as General Counsel].

77. Collyer Insulated Wire, 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931, 1936 (1971).

78. *Arbitration Deferral Policy under Collyer*, Memorandum of NLRB General Counsel Peter G. Nash to NLRB Regional Directors and Officers-in-Charge, 49 BNA Daily Labor Report 6 (1972) [hereinafter cited as Memo].

tions in order to assure Board deference has not been determined. The Board, however, may consider the remoteness of either cooperative or uncooperative conduct and may offset a history of conflict with evidence of recent improvements in relations.[79] The Board has reiterated the importance of a continuing collective bargaining relationship in its decision to defer in *Titus-Will Ford Sales*.[80]

Second, the Board pointed out in *Collyer* that, as in *Schlitz*, "no claim is made of enmity by respondent to employees' exercise of protected rights."[81] Accordingly, the extent to which the *Collyer* deferral policy will apply to discriminatory practices under section 8(a)(1) and (3) is questionable. The General Counsel feels that it could be argued that all 8(a)(3) and most of 8(a)(1) violations involve some form or degree of enmity and, therefore, are outside of *Collyer*.[82] Nevertheless, the Board's reliance on *Spielberg*, an 8(a)(3) case deferring to arbitration may make this a viable issue. Prior to *Collyer*, in *Curtis Manufacturing Co.*,[83] the Board refused to defer to arbitration, stating that discharge for discriminatory anti-union reasons is an issue peculiarly within the NLRB's expertise. In a more recent case, *Tulsa-Whisenhunt Funeral Homes*,[84] the union contended that the employer had unlawfully discharged employees. The Board again refused to defer to a discriminatory practice claim, despite an ad hoc agreement between the parties which covered the situation. While the Board has not explicitly precluded application of the principles espoused in *Collyer* to alleged section 8(a)(3) violations, it is improbable that the Board will defer to such cases in light of its consistent refusal to do so in the past.[85] The Board has, also, declined to defer to an arbitration procedure provided in a collective bargaining agreement where the union allegedly engaged in discriminatory practices in violation of section 8(2)(a).[86] The company was not a party to the complaint, and the Board reasoned that resort to arbitration would not adequately represent the rights of the discharged employees.

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79. *Id.*

80. 197 N.L.R.B. No. 4 (1972).

81. Collyer Insulated Wire, 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931, 1936 (1971).

82. GENERAL COUNSEL, *supra* note 76, at 162.

83. 189 N.L.R.B. No. 38 (1971). Although the case occurs prior to *Collyer*, it is useful to illustrate recent Board policy with respect to unfair labor practices.

84. 195 N.L.R.B. No. 20 (1972).

85. *See* notes 36-41 *supra* and accompanying text.

86. Laborers Local 573, 196 N.L.R.B. No. 62 (1972).

Third, in *Collyer* the Board relied on the employer's credible assertion of the availability of arbitration under the terms of the contract.[87] In Member Fanning's dissent, the point was raised that the arbitration time had run under the terms of the contract and that compelling arbitration of a grievance which is no longer contractually arbitrable verges on compulsory arbitration. The majority opinion rejected this contention, holding that it was merely giving full effect to the arbitration agreement between the parties.[88] It is still undecided what the Board will do if the respondent is willing to arbitrate during the contractual period for filing a grievance and arbitration, but refuses to arbitrate after the expiration of this period.[89] Nevertheless, the Board in *Collyer* did retain jurisdiction with the plain implication that the employer must arbitrate to avoid further Board consideration. One of the reasons for not deferring in *Curtis Manufacturing Co.* was the employer's intention to argue before the arbitrator that the grievance was not filed timely under the terms of the contract.[90]

Fourth, an unfair labor practice charge will not be deferred for arbitration under the *Collyer* doctrine unless the contract provides that the procedures culminating in binding arbitration are the exclusive means for settlement of the dispute. The General Counsel has stated, "the *Collyer* policy of deferral is viewed as predicated not on the availability of arbitration to the charging party, but on the charging party's having prospectively and voluntarily obligated itself by contract to seek redress by no means other than arbitration in contract disputes with the respondent."[91] The Board did not defer in *Tulsa-Whisenhunt,* where the collective bargaining agreement did not commit either the employer or the union to third party arbitration.[92] But where the contract contains a grievance procedure which provides that all misunderstandings or disputes of any character relative to interpretations of matters cov-

87. Collyer Insulated Wire, 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931, 1937 (1971).

88. *Id.*

89. MEMO, *supra* note 78, at 3. The majority of the Board considered the question of limits on the filing of grievances to have been irrelevant to its decision. It was enough for the Board's purpose that the respondent was willing to arbitrate despite any time limitations contained in the contract. So viewed, the Board's decision indicates that a party which seeks deferral of a charge for arbitration must be willing to waive any arbitration time limitations which the contract may contain.

90. 189 N.L.R.B. No. 38 (1971).

91. MEMO, *supra* note 78, at 5.

92. 195 N.L.R.B. No. 20 (1972).

ered by the agreement are to be finally resolved by binding arbitration, the Board has recently deferred.[93]

Other circumstances in *Collyer* may be summarized:

> [T]he dispute is one eminently well suited to resolution by arbitration. The contract and its meaning in present circumstances lie at the center of this dispute. In contrast, the Act and its policies become involved only if it is determined that the agreement between the parties examined in the light of its negotiating history and the practices of the parties thereunder, did not sanction Respondent's right to make the disputed changes, subject to review if sought by the Union, under the contractually prescribed procedure. That threshold determination is clearly within the expertise of a mutually agreed upon arbitrator.[94]

In the General Counsel's opinion, "not every alleged unfair labor practice which may be subject to a grievance-arbitration procedure should be deferred for arbitration; the *Collyer* policy may cover only those disputes which involve the construction and application of substantive contract terms."[95] The dispute must be centered on the terms of the contract. The Board in *Collyer* indicated that the question of deferral arises "only when a set of facts may present not only an alleged violation of the Act, but also an alleged breach of the collective bargaining agreement subject to arbitration."[96] To warrant deferral the underlying dispute must be encompassed by the arbitration provisions of the contract.[97]

CONCLUSION

At this time, with the extreme backlog of cases, the rising costs and the increase in time necessary to take a dispute before the NLRB,[98] the Board may be recognizing that the primary purpose of the Act, the

93. Great Coastal Express, 196 N.L.R.B. No. 129 (1972); Wrought Washer Mfg. Co., 197 N.L.R.B. No. 14 (1972); Titus-Will Ford Sales, 197 N.L.R.B. No. 4 (1972).

94. Collyer Insulated Wire, 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931, 1936 (1971).

95. GENERAL COUNSEL, *supra* note 76, at 164.

96. Collyer Insulated Wire, 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931, 1936 (1971).

97. For recent cases on this point see Titus-Will Ford Sales, 197 N.L.R.B. No. 4 (1972); Wrought Washer Mfg. Co., 197 N.L.R.B. No. 14 (1972); Beer Distributors Ass'n, 196 N.L.R.B. No. 165 (1972); Great Coastal Express, 196 N.L.R.B. No. 129 (1972).

98. Note, *Contractual Interpretation, Unfair Labor Practices, and Arbitration: A Proposed Resolution of Jurisdictional Overlap*, 68 MICH. L. REV. 141, 145 (1969).

promotion of industrial peace, is better effectuated by deferring to the arbitration procedures provided for in a collective bargaining agreement. When the private settlement procedures will satisfy the purposes of the Act, federal action in the form of the NLRB need not be utilized. The General Counsel has stated that he will give operational effect to *Collyer*. Thus, when the parties have contractually committed themselves to mutually agreeable procedures for resolving their disputes during the period of the contract, full opportunity will be given to allow these procedures to function.[99] Recent cases are beginning to reflect this policy. Where the dispute is found to involve the meaning and application of a provision of the collective bargaining agreement, the Board is frequently deferring to arbitration.[100] The policy of promoting industrial peace and stability through collective bargaining requires the parties to honor the contractual grievance and arbitration obligation that they themselves have voluntarily established under binding commitment.[101]

99. GENERAL COUNSEL, *supra* note 76, at 165.
100. *See* cases note 97 *supra.*
101. Titus-Will Ford Sales, 197 N.L.R.B. No. 4 (1972).